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Foreword

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The *William Mitchell Law Review* has again prepared and collected a series of articles and case comments for an Eighth Circuit issue. I commend the members of the *Law Review* for their effort and I am sure that we will all benefit from their scrutiny of some of our cases. I have not had the opportunity to examine any of the pieces published in this issue as I prepare this introduction. The list of topics that I received from the editors suggests, however, that the issue contains interesting commentary on a variety of subjects.

The offer to write a foreword to this issue prompted me to first consider the nature and scope of such a contribution, especially since I served as a panel member on three of the six cases under review. My conclusion was that a foreword, especially one written without examination of each article, should be brief, genial and nonspecific.

I hope that my critique of the cases in which I participated will live up to Wilson Follett's observation that the contents of a foreword should be essentially "noncommittal,"[1] although some may claim that I misconstrue Follett's intent as advanced by such statement.

Professor Robert Oliphant has written an article on the increasing number of en banc decisions by our circuit in recent years. It is my understanding that the piece was prompted by an article in *Judicature*,[2] the journal of the American Judicature Society. The *Judicature* article was, in turn, prompted, at least in part, by a remark by our Circuit Justice, Harry A. Blackmun, at the 1988 Judicial Conference in St. Louis. I will not, under the circumstances, proffer even a general comment on the discussion. I note, in passing, that an examination of the reason

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1. W. Follett, *Modern American Usage* 153 (1980).

2. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 Judicature 133 (1990).

for a series of events based upon the number of such occurrences is often a risky venture.

Pendent party jurisdiction, as discussed in *Lockhard v. Missouri Pacific R.R.*,[3] is the subject matter of a Note I very much look forward to reading, especially in light of my partial dissent in the case. Our appeal was decided in the context of *Finley v. United States*,[4] a case in which the Supreme Court seemed to invite Congress to consider amendments to the statutes governing federal jurisdiction. This invitation was renewed by the Federal Courts Study Committee in its Report of early 1990,[5] and Congress responded through enactment of 28 U.S.C. § 1267, effective for all civil actions commencing after December 1, 1990. My concern for efficient use of scarce federal trial court resources, heightened by almost six years as a federal district judge, prompts me to recommend this case comment to all present and potential federal court litigators and to laud Congress for this change.

The decision in *United States v. Fortier*[6] has prompted both a Case Note in this issue and an en banc proceeding, pending for oral hearing at this time, in *United States v. Wise*.[7] Given this turn of events, I will again be noncommittal except to urge you to read both the article and the in banc opinion in *Wise*, assuming that one is ultimately filed.

The interplay between free speech, free press, and the protection of individuals from defamatory words brings to the courts some of the thorniest issues in the law. The Uniform Laws Conference is even trying its hand at drafting proposed state legislation that attempts to balance the rights involved.[8] The comment contrasting *Milkovich v. Lorain Journal Co.*[9] and *Janklow v. Newsweek, Inc.*[10] apparently wades fearlessly into these waters and should be good reading for private citizen, public figure and all first amendment lawyers.

Limitations on space prompt me to discuss the balance of

3. 894 F.2d 299 (8th Cir. 1989).
4. 490 U.S. 545 (1989).
5. FEDERAL COURTS STUDY COMMITTEE REPORT 47-48 (April 2, 1990).
6. 911 F.2d 100 (8th Cir. 1990).
7. 923 F.2d 86 (8th Cir. 1991).
8. Drafting Committee on Defamation Act, Conference of Commissioners on Uniform State Laws.
9. 110 S. Ct. 2695 (1990).
10. 788 F.2d 1300 (8th Cir. 1986).

the commentary in summary fashion or not at all. I note that *Gregory v. Ashcroft*,[11] the subject matter of one Case Note, is now before the Supreme Court, certiorari having been granted in November of last year.[12]

My final observation is really a postscript on a point made in last year's issue by my esteemed colleague, Judge Roger L. Wollman. The observation also permits me to mention that *Goodwin v. Turner*,[13] which concerns artificial insemination and prison rules, provides the basis for another case discussion published in this issue. In this matter, as well as in *Janklow*, a vigorous and well-reasoned dissent was lodged. It should be pointed out that the debate and differences evident from these and other opinions enhance, rather than diminish, the collegiality of the court. Each of us was, in the past, a practicing lawyer, familiar with the rough and tumble of the adversarial process. The robust interchange of ideas, at conference and later, hones and strengthens our opinions and provides an enjoyable part of our judicial lives.

Whatever the number of en banc decisions we reach each year, I view our court as succeeding in our attempt to disagree when we must without being disagreeable then or thereafter. We continue, in my view, to be the collegial court described by Judge Wollman in 1990.

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11. 898 F.2d 598 (8th Cir. 1990).
12. 111 S. Ct. 507 (1990).
13. 908 F.2d 1395 (8th Cir. 1990).